IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GINNIE DAWSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10137 Trial Court No. 3KN-07-1544 Cr MEMORANDUM OPINION No. 5580 — March 31, 2010

Appeal from the District Court, Third Judicial District, Kenai, Sharon A. S. Illsley, Judge.

Appearances: Tracey Wollenberg, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for the Appellee.

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

MANNHEIMER, Judge.

Ginnie Dawson was charged with fourth-degree assault under AS 11.41.-230(a)(1) for hitting her domestic partner, Patrick Meyer, with her fists and with a metal baking pan. To prove this charge, the State had to establish that Dawson "recklessly

cause[d] physical injury to [Meyer]". As used in the criminal code, the term "physical injury" means "physical pain or an impairment of physical condition". [1]

The State alleged that Dawson's conduct (her striking of Meyer) caused Meyer to suffer physical pain. At trial, Dawson conceded that she struck Meyer, but she contended that she did not cause him physical pain. Meyer took the stand and agreed that he did not suffer pain (other than emotional pain) during the attack.

Based on this testimony, Dawson's attorney asked the trial judge to instruct the jury on the lesser offense of disorderly conduct as defined in AS 11.61.110(a)(5) — "engag[ing] in fighting other than in self-defense". The defense attorney argued that if the jury believed Meyer's testimony that he had not suffered pain, then the State would have proved only that Dawson fought with Meyer — and, thus, disorderly conduct under subsection (a)(5) would be the proper verdict.

The trial judge refused to instruct the jury on disorderly conduct because (1) the judge concluded that "fighting" meant a physical struggle between two or more people, and (2) there was no evidence that Meyer and Dawson had engaged in mutual struggle — *i.e.*, no evidence that Meyer had responded with physical force to Dawson's blows.

The jury convicted Dawson of fourth-degree assault, and Dawson now appeals the trial judge's refusal to instruct the jury on disorderly conduct.

The underlying issue in this case is whether the term "fighting", as used in subsection (a)(5) of the disorderly conduct statute, includes all situations where one person strikes another, even though there is no mutual combat — *i.e.*, even when the second person does not respond with force. This Court has already directly addressed

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[1] AS 11.81.900(b)(46).

and answered this question in an unpublished opinion: *Hedgers v. State*, Alaska App. Memorandum Opinion No. 4056 (June 2, 1999), 1999 WL 349062.

The defendant in *Hedgers* was convicted of disorderly conduct under subsection (a)(5) of AS 11.61.110 — *i.e.*, fighting other than in self-defense — based on evidence that, during a verbal dispute with another woman, she bumped the other woman in the chest and used her knee to kick the woman in the leg. *Hedgers*, 1999 WL 349062 at *1.

On appeal, Hedgers argued that she was wrongly convicted because "fighting" required mutual combat. [2] This Court rejected Hedgers's argument. We held that the term "fighting" encompassed any "physical struggle" — more specifically, that it included "those 'fights' that are one-sided due to choice, surprise by the aggressor, or simply the superior ability of a participant." *Hedgers*, 1999 WL 349062 at *1.

In other words, the *Hedgers* decision rejected the interpretation of "fighting" that Dawson's trial judge employed in this case. Instead, *Hedgers* adopted the interpretation that Dawson proposes: "fighting" includes instances where one person knowingly strikes another, even though that other person does not respond with force.

This Court issued *Hedgers* as a memorandum opinion; therefore, as a legal matter, we are not bound by the interpretation of AS 11.61.110(a)(5) that we adopted in *Hedgers*. Moreover, the present author dissented in *Hedgers*; I would have interpreted the word "fighting" as requiring a mutuality in the combat. *See Hedgers*, 1999 WL 349062 at *2-5. In other words, I would have adopted the same interpretation of subsection (a)(5) that Dawson's trial judge employed when she declined to instruct Dawson's jury on the lesser offense of disorderly conduct.

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[2] *Hedgers*, 1999 WL 349062 at *1.

But though *Hedgers* is a memorandum opinion, it is the sole appellate decision directly on point. And although the present author dissented in *Hedgers*, the *Hedgers* interpretation continues to have the tentative allegiance of a majority of this Court.

We say "tentative allegiance" because, in Dawson's case, there has been no adversarial briefing regarding the merits of the *Hedgers* interpretation of "fighting". The decision in *Hedgers* was apparently not brought to the attention of the trial judge. Moreover, the *Hedgers* decision was not mentioned in the parties' briefs to this Court until Dawson filed her reply brief. Thus, the only adversarial discussion of *Hedgers* occurred at the oral argument in this case — when Dawson asked us to adhere to our former decision, and the State asked us to adopt the reasoning of the *Hedgers* dissent.

Because there has been no adversarial briefing of this dispute, we adhere to our decision in *Hedgers* for purposes of deciding Dawson's case, but we again issue our decision as a memorandum opinion.

The State alleged that Dawson committed fourth-degree assault by unlawfully striking Meyer and, in doing so, inflicting physical injury (*i.e.*, physical pain) on him. At Dawson's trial, she conceded that she struck Meyer, and the primary dispute between the parties was whether Meyer suffered physical injury as a result of Dawson's hitting him.

In *Hedgers*, this Court interpreted AS 11.61.110(a)(5) — in particular, the term "fighting" — to encompass all instances where one person knowingly strikes another (other than in self-defense), even when the other person does not respond with force. Given our construction of the disorderly conduct statute in *Hedgers*, and given the way Dawson's case was litigated, Dawson was entitled to a jury instruction on the lesser offense of disorderly conduct. This is the lesser offense that would remain if the

jury concluded that the State had failed to prove that Meyer suffered physical injury as a result of being struck by Dawson.

The judgement of the district court is REVERSED. Dawson is entitled to a new trial.

We address one further issue — a question of evidence — in the event that Dawson is retried.

At Dawson's trial, the State offered evidence that Dawson had assaulted Meyer on an earlier occasion. Meyer likewise claimed that he suffered no pain during this earlier assault. The trial judge ruled that this evidence was admissible under Alaska Evidence Rule 404(b)(4) because it was a prior incident of domestic assault that tended to prove that Dawson had assaulted Meyer in the present case.

We believe it is a close question whether this evidence should have been admitted under Rule 404(b)(4) for the purpose of proving Dawson's conduct in this case. The evidence clearly qualified for admission under Rule 404(b)(4), because it was a prior incident of domestic violence committed by Dawson, but it is unclear whether this prior incident had significant probative value as circumstantial evidence of Dawson's conduct in the present case. There was no dispute in this case concerning Dawson's conduct: she conceded that she struck Patrick Meyer with her fists and with the baking pan, as the State alleged. The dispute at trial was whether Dawson's conduct caused injury to Meyer — more specifically, whether it caused him physical pain.

However, we conclude that this evidence was independently admissible under Evidence Rule 404(b)(1) as evidence of *Meyer's* conduct.

To resolve Dawson's case, the jury had to evaluate the credibility of Meyer's testimony that Dawson's assault had not caused him physical pain. When the jury assessed the credibility of Meyer's testimony, it was relevant that, on a prior

occasion, Dawson assaulted Meyer, the police were called, and Meyer again claimed that the assault had not caused him pain or other injury.

Moreover, the potential unfair prejudice of this evidence was minimal because (as we have already explained) Dawson conceded that she struck Meyer in the present case. Accordingly, we conclude that this evidence would be admissible at a retrial.